NO. 21,054

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD J. ARRIAS,

Petitioner,

v.

THE STATE OF CALIFORNIA AND
THE UNITED STATES OF AMERICA,

Respondents

RESPONDENT'S BRIEF

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TEXT

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STATEMENT OF THE CASE

The Court approved petitioner's request that his petition for judicial review of deportation be considered his opening brief.

Petitioner is an alien Dutch citizen, age 23 in 1966, who entered the United States at San Juan, Puerto Rico, March 19, 1954.

On December 18, 1964 he was convicted, after trial in the Superior Court of the State of California in and for the County of Los Angeles, of the crime of violation of Section 11530.5 of the Health and Safety Code (R., pp. 22 and 24). The Court fixed the minimum term at six months, pursuant to Section 1202(b) of the California Penal Code.

The order to show cause in deportation proceedings under Section 242 of the Immigration and Nationality Act (8 USC 1252) was dated April 27, 1965, and ordered petitioner to appear for hearing on May 4, 1965, and charged deportability pursuant to "Section 241(a)(11) (8 USC 1252(a)(11)) in that you at any time have been convicted of a violation of any law or regulation relating to the illicit possession of marihuana in violation of Section 11530.5 of the California Health and Safety Code."

The hearing was held at the Correctional Training Facility, Soledad, California, on May 4, 1965. The Special Inquiry Officer delivered an oral statement of his decision (R., p. 16), and

petitioner acknowledged that he understood the decision. He was told that "if you are not satisfied with this decision you may appeal to the Board of Immigration Appeals in Washington, D. C." He asked if he could leave this decision till later. He was informed, "Yes, you may." He was served with three copies of Form I-290A, and told he had ten days from May 4, 1965 to enter his appeal.

No appeal was filed to the Board of Immigration Appeals. On May 13, 1965 the respondent mailed to petitioner Notice of Country to Which Deportation Has Been Directed and Penalty for Reentry Without Permission, "Exhibit A" to Petition.

This notice did not arouse petitioner to appeal.

On January 13, 1966 petitioner addressed a letter to Mr. E. A. McFadden (R., p. 7).

On January 24, 1966 petitioner's letter was referred to Special Inquiry Officer Sipkin, with the suggestion that it be considered as a motion to reopen the deportation proceeding (R., p. 6).

The exchange of correspondence between Mr. Williams and Mr. Sipkin then followed, which established for the record that petitioner had not appealed his conviction.

On January 31, 1966 the Special Inquiry Officer made his decision denying the motion to re-open. Notice of Decision was mailed certified mail, return receipt requested, on the same date (R., p. 1). This notice enclosed copies of Form I-290A, Notice of Appeal, and informed petitioner that the decision is final unless appeal is taken to the Board of Immigration Appeals, by returning to respondent on or before February 14, 1966 Form I-290A, properly executed, together with a $25 fee.

Respondent did not appeal. The petition for review was docketed by the Clerk of this Court on June 24, 1966.

This Court has consistently dismissed petitions for review filed under Section 106(a) of the Act for failure to exhaust administrative remedies by appeal to the Board of Immigration Appeals.

Siaba-Fernandez v. Rosenberg, 9 Cir.
302 F.2d 139

Mai Kai Fong v. INS, 9 Cir.
305 F.2d 239

Murillo-Aguilera v. INS, 9 Cir.
313 F.2d 141

Raymond Rodriguez-De Leon v. INS, 9 Cir.
324 F.2d 311

Samala v. INS, 5 Cir.
336 F.2d 7, 11

In Samala the Court noted:

> "In the hearing before the special inquiry officer, it was made emphatically clear to petitioner that he had a right to appeal the deportation order to the Board of Immigration Appeals within ten days after its rendition. Petitioner was even given an appeal form, partially filled out, for his use should he decide to appeal."

Likewise, petitioner in this case was fully advised of his right to appeal, and the time, both as to the original decision and the denial of the motion to reopen.

Assuming petitioner had exhausted his administrative remedies, this Court has jurisdiction to review the final order of deportation.

QUESTIONS

Was petitioner accorded a fair hearing and due process?

Is the order of deportation supported by reasonable, substantial and probative evidence, that is clear, unequivocal and convincing?

ARGUMENT

In his petitioner's brief, petitioner presents a number of contentions.

Contention I - Paragraph IV - Right to Counsel

Deportation proceedings are civil, not criminal.

Fong Yue Ting v. INS
149 US 698

Harisiades v. Shaughnessy
342 US 580

Galvan v. Press
347 US 522

Ben Huie v. INS, 9 Cir.
349 F.2d 1014

Fuentes-Torres v. INS, 9 Cir.
344 F.2d 911

Nason v. INS, 2 Cir.
370 F.2d 865

Ah Chiu Pang v. INS, 3 Cir.
368 F.2d 637

Petitioner states that he finished high school (R., p. 15). He clearly indicated he understood why he was appearing at the hearing of May 4, 1965; that he understood he was entitled to be represented by an attorney at no expense to the Government (R., p. 11). He stated he was willing to proceed without counsel. There is no indication that he did not clearly understand.

Petitioner has referred to 28 USC 1915, and would argue that he has an absolute right to the appointment of counsel.

Appointment of counsel in a civil case is, as is the privilege of proceeding in forma pauperis, a matter within the discretion of the district court. It is a privilege and not a right.

U. S. ex rel Gardner v. Madden, 9 Cir.
352 F.2d 792

8 USC 1252(b)(2), Section 242(b)(2) of the Act states:

> "the Attorney General shall prescribe [regulations]. Such regulations shall include requirements that--
> (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;"

8 USC 1362, Section 292 of the Act, states:

> "RIGHT TO COUNSEL
> "Sec. 292. In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

In any event, the presence or absence of counsel would involve the question of due process.

Failure to have counsel, if error, like other errors, may not be prejudicial.

Madokoro v. Del Guercio, 9 Cir.
160 F.2d 164

Immigration Law and Procedure
Gordon and Rosenfeld
§1.23(a) and §5.9(d)

De Bernardo v. Rogers, 2 Cir.
254 F.2d 81;
cert. den. 358 US 816

Petitioner was fully accorded due process, even to the extent that his untimely letter of January 13, 1966 was referred to the Special Inquiry Officer with the request that it be considered a motion to reopen. The denial of the motion accorded to petitioner a second opportunity to appeal to the Board of Immigration Appeals, which he did not do.

Contention II - Law Has Been Misread, And Inaccurately Applied.

Though not so stated, petitioner's contention would appear to be founded upon Section 241(a)(4) (8 USC 1251(a)(4)), as the applicable statute pursuant to which he is deportable.

He has been found deportable pursuant to Section 241(a)(11) (8 USC 1251(a)(11)).

Expulsion must be ordered for a single conviction in the United States, at any time, irrespective of the manner of the alien's entry.

Rabang v. Boyd
353 US 427

Mulcahy v. Catalanotte
353 US 692

Marcello v. Bonds
349 US 302

Contention III - Double Jeopardy

Respondent refers to the cases cited above as dispositive of this contention.

CONCLUSION

Respondent respectfully submits:

1. The petition should be dismissed, in that petitioner did not exhaust his administrative remedies.

2. Petitioner was accorded a fair hearing and due process, and the record is clear, unequivocal and convincing, in support of the order of deportation.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent
United States of America

DATED:
April 7, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full complaince with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to:

Mr. Ronald J. Arrias
Box A-87988
San Quentin Penitentiary
Tamal, California

In Propria Persona

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Dated:
April 7, 1967